IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1723

STATES STEAMSHIP COMPANY and
PACIFIC FAR EAST LINE, INC.,

Petitioners,

v.

THE HONORABLE ALFONSO J. ZIRPOLI, SENIOR DISTRICT JUDGE,
(R. J. REYNOLDS TOBACCO COMPANY and SEA-LAND
SERVICE, INC., Real Parties in Interest),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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BRIEF IN OPPOSITION

Petitioners' petition for certiorari completely misstates the question presented by this case. Petitioners allege that the District Court has ordered a separate trial pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, and claim that the question presented is whether such a separate trial may be held without a jury when one of the parties has made a jury demand (Pet. 3, 10-11). In fact, the District Court has not ordered a separate trial pursuant to

Rule 42(b).* What the District Court has in fact done is to order an evidentiary hearing on a motion for sanctions, pursuant to Rule 37(b) and other rules of the Federal Rules of Civil Procedure, for willful failure to obey discovery orders of the District Court and for willful misrepresentation of material facts (Pet. A-1-A-5). Petitioners' contention that the holding of such a hearing on a motion for sanctions violates their right to a jury trial is supported by neither principle nor authority, and the Court of Appeals rightly denied petitioners' petition for a writ of mandamus.

Statutes Involved

The Seventh Amendment to the Constitution of the United States and Rule 38(a) of the Federal Rules of Civil Procedure are set forth in petitioners' petition for certiorari (Pet. 2-3). Rule 42(b) of the Federal Rules of Civil Procedure, which is also set forth in the petition for certiorari (Pet. 3), is not involved in this case.

Rule 37(b) of the Federal Rules of Civil Procedure reads in pertinent part as follows:

> "(b) *Failure to Comply with Order.*
>
> . . . .
>
> (2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> (E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

* Indeed, until the filing of their petition for certiorari, petitioners made no claim that the District Court had ordered a separate trial pursuant to Rule 42(b). No such claim was made in petitioners' petition for mandamus in the Court of Appeals or in their arguments in the District Court.

Questions Presented

1. Will the holding of an evidentiary hearing on a motion for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, based upon willful failure to obey discovery orders of the District Court and willful misrepresentation of material facts, violate the right to a jury trial under the Seventh Amendment to the United States Constitution?

2. Did the Court of Appeals abuse its discretion by declining to issue a writ of mandamus to restrain the District Court from holding such an evidentiary hearing?

Statement of the Case

1. The Nature of the Present Actions

The petition herein arises out of two private antitrust actions which are pending before the Honorable Alfonso J. Zirpoli, U.S.D.J., in the United States District Court for the Northern District of California, and which have been consolidated for pretrial purposes. Petitioners Pacific Far East Line, Inc. ("PFEL") and States Steamship Company ("States"), the plaintiffs in these actions, claimed among other things that respondent Sea-Land Service, Inc. ("Sea-Land"), a subsidiary of R. J. Reynolds Industries, Inc., violated the United States antitrust laws by paying rebates.* Sea-Land admitted the past payment of rebates, but denied any antitrust violations. By way of affirmative defense and

* Common carriers by water in the foreign commerce of the United States are required by the Shipping Act of 1916 to file tariffs with the Federal Maritime Commission setting forth their rates for the carriage of goods in the foreign commerce of the United States. 46 U.S.C. § 817(b)(1). The payment of rebates to customers with respect to tariffs so filed is prohibited, subject to civil penalties, by the Shipping Act. 46 U.S.C. §§ 815 (Second), 817(b)(3).

counterclaim, it alleged that petitioners or their agents had paid rebates.

2. Petitioners' Denials of Their Rebating in These Actions

From the outset of these actions, beginning even before their first reply to Sea-Land's counterclaims, both petitioners have consistently denied the payment of rebates. The following chronology sets forth petitioners' principal denials of rebating:

October 15, 1976	PFEL commenced its action.
November 29, 1976	PFEL was deposed by its President. He testified that PFEL had not paid rebates (John I. Alioto Dep., Nov. 29, 1976, pp. 67-70, 76-77; *see* Pet. A-2).
December 23, 1976	PFEL replied to Sea-Land's counterclaim and specifically denied that it had paid or was paying rebates, directly or through its agents (Pet. A-2, F-2).
February 3, 1977	PFEL replied to Sea-Land's counterclaim in response to PFEL's amended complaint, again denying the payment of rebates (Pet. A-3, H-2).
February 28, 1977	Petitioners' attorney responded to the District Court's question as to PFEL's rebating by stating that "our knowledge so far is that it's not so" (Feb. 28, 1977 Tr. 16; *see* Pet. A-3).
March 21, 1977	States commenced its action.

July 1, 1977 — In response to a question by the District Court concerning whether PFEL would produce its rebate documents, petitioners' attorney stated that PFEL had denied rebating (July 1, 1977 Tr. 20; *see* Pet. A-3).

July 12, 1977 — States replied to Sea-Land's counterclaim, and denied that it had paid or was paying rebates, directly or indirectly (Pet. A-3, K-1-K-2).

January 16, 1978 — Petitioners answered respondents' interrogatories. PFEL stated that the only payments made by PFEL or anyone else to its cotton customers from October 15, 1972 to October 15, 1976 were payments for cargo claims and adjustments, and States alleged that the only payments made by States or anyone else to its cotton customers from March 21, 1973 to March 21, 1977 were for claims for loss or damage to cotton shipments (*see* Pet. A-3).

January 23, 1978 — Respondents commenced compliance depositions of petitioners. The second witness tendered by States testified that the only documents identifying persons who had paid monies to customers of States were documents relating to cargo claims and correction notices (Kreuger Dep., Jan. 23, 1978, pp. 5-6; *see* Pet. A-3).

February 13, 1978 — In response to respondents' first motion for sanctions, petitioners filed

affidavits averring that it would have been pointless for petitioners to search their sales files for rebating documents because they knew there were no such documents in their sales files (Genovese Aff., Feb. 13, 1978, Ex. A, pp. 8-9, Ex. B, pp. 6-7; Coghlan Aff., Feb. 13, 1978, p. 2; *see* Pet. A-4).

December 13, 1978 — Petitioners' attorney admitted to the District Court that PFEL had paid rebates until the end of 1977 (Dec. 13, 1978 Tr. 68). He asserted that PFEL did not pay rebates before October 15, 1976, although he admitted that an agent of PFEL did pay rebates before October 15, 1976 (Dec. 13, 1978 Tr. 22).

3. Petitioners' Failure to Obey the Discovery Orders of the District Court

Petitioners have failed to obey repeated orders of the District Court to produce documents relating to rebating:

July 11, 1977 — Respondents served interrogatories and document requests upon PFEL, seeking, among other things, all documents of PFEL and its agents relating to rebating by any person to PFEL's customers for the period from October 15, 1972 to October 15, 1976.

July 21, 1977 — PFEL objected to each of respondents' interrogatories and document requests.

September 21, 1977 — Respondents served interrogatories and document requests upon States, seeking, among other things, all documents of States and its agents relating to rebating by any person to States' customers for the period from March 21, 1973 to March 21, 1977.

October 17, 1977 — States objected to each of respondents' interrogatories and document requests.

December 20, 1977 — The District Court ordered PFEL and States to comply in full with respondents' document requests and interrogatories (Dec. 20, 1977 Order, p. 2).

January 16, 1978 — Petitioners served answers to interrogatories and produced documents. Petitioners did not produce any documents listing the amounts or recipients of rebates paid by petitioners, and did not produce any documents from the files of their agents.

January 31, 1978 — After taking compliance depositions of petitioners, respondents filed a motion for sanctions based on petitioners' failure to produce documents and answer interrogatories as ordered by the District Court.

February 28, 1978 — The District Court did not grant respondents' motion for sanctions, but again directed petitioners to provide full responses to respondents' interrogatories and document requests, including specifically documents in the possession of petitioners' agents (Feb. 28, 1978 Order, p. 3). Again, petitioners did not produce any documents listing the amounts or recipients of rebates paid by petitioners, and did not produce any documents from the files of their agents.

July 6, 1978 — The District Court for the third time ordered petitioners and their affiliates to produce rebating documents, and directed petitioners to file affidavits attesting to the completeness of the production (July 6, 1978 Order, pp. 5-6). The District Court also directed petitioners to instruct their present and former agents in the Far East to permit respondents' representatives immediate and continuous access to search for documents relating to rebating (July 6, 1978 Order, pp. 2-4).

July 10-22, 1978 — Pursuant to the District Court's order of July 6, 1978, respondents' representatives attempted to obtain access to offices of petitioners' present and former agents in Japan, Hong Kong, and Taiwan. Although some documents were produced, respondents' representatives were substantially denied the immediate and continuous access required by the District Court's order.

August 21, 1978 — Without producing any additional documents, States filed an affidavit in purported compliance with the District Court's order of July 6, 1978. The affidavit on its face failed to comply with the District Court's order.

August 22, 1978 — Without producing any additional documents, PFEL filed an affidavit in purported compliance with the July 6, 1978 order. The affidavit on its face failed to comply with the District Court's order.

October 17, 1978 — States served and filed a further affidavit, which likewise failed to meet the requirements of the July 6, 1978 order.

4. Respondents' Motion for Sanctions and the District Court's Order Directing an Evidentiary Hearing

On July 24, 1978, respondents served and filed a motion for dismissal of petitioners' complaints and for further sanctions. This motion was based upon two fundamental grounds: (1) petitioners' willful misrepresentation of material facts to respondents and to the District Court (Pet. A-2-A-4); and (2) petitioners' willful failure to obey the discovery orders of the District Court (Pet. A-4).* After

* Petitioners allege in their petition for certiorari that the sole ground of respondents' motion for sanctions is that petitioners, contrary to their denials, engaged in rebating (Pet. 10). This allegation is false. As made clear by the order which petitioners seek to review (Pet. A-2-A-4), respondents' motion is based both upon petitioners' knowing misrepresentations and upon their willful failure to obey the orders of the District Court.

examining respondents' motion for sanctions and petitioners' answering papers, the District Court expressly determined that respondents' motion for sanctions is a proper subject for an evidentiary hearing by the Court (Pet. A-5).

The evidence supporting respondents' motion for sanctions need not be reviewed in detail in this brief. Petitioners' own assessment of the strength of this evidence is suggested by the many steps which petitioners have taken to forestall the holding of the evidentiary hearing, which have included numerous requests for adjournments, extensive discovery on a counter-motion for sanctions against respondents, and a petition for mandamus to the Court of Appeals, followed by the petition for certiorari which is now before this Court.

5. The Denial of Mandamus by the Court of Appeals

On January 16, 1979, petitioners filed a petition for mandamus with the United States Court of Appeals for the Ninth Circuit, contending that the holding of an evidentiary hearing would violate their right to a jury trial. On April 20, 1979, petitioners' petition for mandamus was denied by the Court of Appeals (Circuit Judges Sneed and Anderson) (Pet. B-1).

Reasons for Denying the Writ

The rulings of the District Court and the Court of Appeals are entirely consistent with the uniform holding of the courts that evidentiary hearings on motions for discovery sanctions are necessary and appropriate to the administration of justice and do not contravene the Seventh Amendment. Petitioners have cited no authority to the contrary, and have presented no issue worthy of review by this Court.

1. Willful Deception or Failure to Obey Court Orders in the Course of Discovery Calls for the Imposition of Sanctions

Willful deception or failure to obey court orders in the course of discovery calls for the imposition of sanctions. *See, e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640-43 (1976); *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 208-13 (1958). This principle has assumed increasing importance at a time of rapidly growing concern with abuses of the discovery process.*

In *G-K Properties* v. *Redevelopment Agency*, 577 F.2d 645 (9th Cir. 1978), for example, the District Court dismissed an action for just compensation because of plaintiffs' knowing failure to produce financial records. The Court of Appeals emphatically upheld the District Court's dismissal of the action:

> "Here the court dismissed the plaintiffs' action with prejudice. It acted properly in so doing. We encourage such orders. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism. . . ." 577 F.2d at 647.

Similarly, in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), this Court

* *See, e.g.*, W. H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 290 (1978); ABA, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 192-94 (1976); ABA Section of Litigation, *Report of the Special Committee for the Study of Discovery Abuse* 24-25 (1977).

stressed that the sanction of dismissal serves the important function of deterring other litigants who might be tempted to abuse the discovery process. Lower Federal courts have repeatedly held that an action may be dismissed for willful failure to comply with a discovery order.*

2. The District Court May Hold an Evidentiary Hearing to Resolve Disputed Factual Issues on a Motion for Sanctions

In determining whether the sanction of dismissal or other sanctions should be imposed, the courts are often required to resolve disputed factual issues. For example, a potential issue in any case where the sanction of dismissal is involved is whether the defaulting party's conduct was willful. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 212 (1958). The issue of willfulness is often disputed, and when it is the courts are required both to find facts and to make inferences from such facts. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 211-13 (1958); *G-K Properties* v. *Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978). Where a disputed issue of fact is presented on a motion for sanctions, the District Court may and often should hold

* *See, e.g., Paine, Webber, Jackson & Curtis, Inc.* v. *Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3, 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *Emerick* v. *Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976); *Von Brimer* v. *Whirlpool Corp.*, 536 F.2d 838, 843 (9th Cir. 1976); *Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989, 992-93 (8th Cir. 1975); *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1210-11 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Kelley* v. *United States*, 338 F.2d 328, 329 (1st Cir. 1964); *Independent Investor Protective League* v. *Touche Ross & Co.*, 25 Fed. R. Serv. 2d 222, 226 (2d Cir. 1978); *United States* v. *Moss-American, Inc.*, 78 F.R.D. 214, 216-17 (E.D. Wis. 1978); *cf., e.g., Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370, 1374-75 (10th Cir.), *cert. denied*, 99 S. Ct. 114 (1978).

an evidentiary hearing to resolve it. *See, e.g., Flaks* v. *Koegel,* 504 F.2d 702, 712 (2d Cir. 1974).

In *Fox* v. *Studebaker-Worthington, Inc.,* 516 F.2d 989 (8th Cir. 1975), for example, the District Court dismissed the plaintiffs' complaint after holding an evidentiary hearing and resolving disputed issues of credibility. In that case Anthony Fox, one of the three plaintiffs, admitted that he had engaged in "bugging" of conversations in defendants' offices, including conversations with defendants' trial counsel. Fox first claimed that he had destroyed all tapes of these conversations, and then later said that he had retained some of them. Still later, Fox claimed that no bugging had ever taken place. Although plaintiffs' counsel conceded that a dismissal of the complaint was appropriate as to Fox, plaintiffs contended that the complaint should not be dismissed as to the other two plaintiffs, who claimed to be innocent of knowledge of Fox's misconduct. After holding a hearing at which these plaintiffs testified, the District Court rejected this contention as "inherently implausible", and the Court of Appeals affirmed, stating that "[c]redibility of witnesses is for the trier of fact to determine." 516 F.2d at 993.

Similarly, in *Independent Investor Protective League* v. *Touche Ross & Co.,* 25 Fed. R. Serv. 2d 222 (2d Cir. 1978), the Court of Appeals affirmed the dismissal of a complaint because of plaintiffs' failure timely to file interrogatory answers in compliance with a court order. In deciding the sanctions motion, the District Court held a three-day evidentiary hearing concerning the circumstances under which plaintiffs' purported answers to interrogatories were served, and concluded that there was "no credible evidence" that the interrogatory answers were timely executed and served. 25 Fed. R. Serv. 2d at 225.

Again, in *Von Brimer* v. *Whirlpool Corp.,* 536 F.2d 838 (9th Cir. 1976), the plaintiff failed to produce documents as required by a court order. At trial, the plaintiff attempted to introduce the documents to prove a critical part of his case. The District Court ruled that such evidence should be excluded pursuant to Rule 37(b)(2)(B), and this ruling was affirmed by the Court of Appeals. In reaching its conclusion, the District Court received testimony and made findings of fact concerning the documents involved. 536 F.2d at 844.

Thus it is well established that the District Court may hold an evidentiary hearing to resolve disputed issues of fact on a motion for the sanction of dismissal or for other sanctions. The District Court's order directing an evidentiary hearing on defendants' motion for sanctions in the present case is thus an entirely proper exercise of the District Court's jurisdiction.

3. The Holding of an Evidentiary Hearing on a Motion for Sanctions Does Not Violate the Right to a Jury Trial

In their petition for certiorari, petitioners cite no authority whatever for the proposition that the holding of an evidentiary hearing on a motion for sanctions violates the right to a jury trial.* In fact, all of the authorities in point hold that the granting of sanctions does not violate the right to a jury trial.

In *McMullen* v. *Travelers Insurance Co.,* 278 F.2d 834 (9th Cir.), *cert. denied,* 364 U.S. 867 (1960), the plaintiff's

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* Petitioners' petition for certiorari relies upon *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959) (Pet. 16-17). The *Beacon Theatres* case, however, had nothing to do with the issue presented in the present case. Instead, *Beacon Theatres* concerned the right to a jury trial in a case where legal and equitable claims involve common factual issues.

complaint was dismissed because he refused to submit to a physical examination as ordered by the Court. On appeal, the plaintiff contended that this dismissal violated his right to a jury trial. The Court of Appeals affirmed the District Court, holding:

> "McMullen insists he was still entitled to a jury trial on all issues, including his physical condition. The right to a jury trial depends upon having an issue to go to a jury. By his own act or inaction, McMullen lost his. . . ." 278 F.2d at 835.

Similarly, in *Rohauer* v. *Eastin-Phelan Corp.*, 499 F.2d 120 (8th Cir. 1974), the plaintiff's complaint was dismissed for willful failure to comply with the discovery orders of the Court. The plaintiff argued on appeal that this violated his Seventh Amendment right to trial by jury. The Court of Appeals rejected this argument as "frivolous". 499 F.2d at 122.

The conclusion that there is no right to jury trial on a motion for sanctions under Rule 37(b) of the Federal Rules of Civil Procedure is confirmed by the history of discovery and discovery sanctions in the Federal courts. This Court has held that the Seventh Amendment preserves the "fundamental elements" of the right to trial by jury as it existed in 1791. *Parklane Hosiery Co.* v. *Shore,* 99 S. Ct. 645, 654 (1979), *quoting Galloway* v. *United States,* 319 U.S. 372, 392 (1943). There was no right to a jury trial on issues of discovery and discovery sanctions in 1791.

In 1791, the method for obtaining discovery and discovery sanctions in an action at law was by a separate bill in equity for discovery in aid of the action at law. *See, e.g., Bas* v. *Steele,* 2 Fed. Cas. 988, 990-91 (C.C.D. Pa. 1818) (No. 1,088) (Bushrod Washington, *J.*), *quoted in Carpenter* v. *Winn,* 221 U.S. 533, 542 (1911); *Geyger's Lessee* v. *Geyger,* 2 U.S. (2 Dall.) 332 (C.C.D. Pa. 1795) (Paterson, *J.*). If the defendant raised a factual issue in response to the bill in equity, it was resolved by the Court, sitting without a jury. *See, e.g., Bas* v. *Steele,* 2 Fed. Cas. 988, 991 (C.C.D. Pa. 1818) (No. 1,088) (Bushrod Washington, *J.*), *quoted in Carpenter* v. *Winn,* 221 U.S. 533, 542 (1911). As a sanction to enforce its determination, the court of equity could enjoin the prosecution of the action at law. *See, e.g., Carpenter* v. *Winn,* 221 U.S. 533, 539 (1911).

Section 15 of the Judiciary Act of 1789, 1 Stat. 82 (1789), made available a streamlined statutory version of the bill in equity for discovery for use in obtaining evidence for use in the trial of an action at law.* *See, e.g., Carpenter* v. *Winn,* 221 U.S. 533, 537-41 (1911); *Hylton* v. *Brown,* 12 Fed. Cas. 1123, 1124 (C.C.D. Pa. 1806) (No. 6,981) (Bushrod Washington, *J.*); *Geyger's Lessee* v. *Geyger,* 2 U.S. (2 Dall.) 332 (C.C.D. Pa. 1795) (Paterson, *J.*). Section 15 of the Judiciary Act of 1789 provided that Federal courts could compel parties to produce books or writings "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of production in chancery;" that in the case of noncompliance by a plaintiff the court could "give the like judgment for the defendant as in cases of nonsuit;" and that in the case of noncompliance by a defendant the court could "give judgment against him or her by default."

As in the case of the bill in equity for discovery, any factual issue arising under Section 15 of the Judiciary Act was resolved by the Court without a jury, either before or

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* The bill in equity for discovery remained available as a means of pretrial discovery in an action at law, which was not within the scope of Section 15 of the Judiciary Act of 1789. *See, e.g., Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. 689, 693 (1933); *Carpenter* v. *Winn,* 221 U.S. 533, 537-41 (1911).

during the trial of the main action at law. *See, e.g., Carpenter* v. *Winn,* 221 U.S. 533, 541 (1911); *Dunham* v. *Riley,* 8 Fed. Cas. 48 (C.C.D. Pa. 1821) (No. 4,155) (Bushrod Washington, *J.*); *Bas* v. *Steele,* 2 Fed. Cas. 988, 990-91 (C.C.D. Pa. 1818) (No. 1,088) (Bushrod Washington, *J.*), *quoted in Carpenter* v. *Winn,* 221 U.S. 533, 542-43 (1911). Thus the history of the bill in equity for discovery and of Section 15 of the Judiciary Act of 1789 confirms that there was no right to jury trial in 1791 on issues of discovery and discovery sanctions.*

The conclusion that there is no right to a jury trial on a motion for sanctions is supported by principle as well as by history and authority. The administration of justice would be gravely impaired if the District Court lacked the power to employ a full range of sanctions—including dismissal—against a party guilty of willful misconduct or disobedience to Court orders. *See, e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643 (1976); *Link* v. *Wabash R.R.,* 370 U.S. 626, 629-30 (1962). Imposition of the sanction of dismissal does not offend any right to jury trial because, as the Court of Appeals pointed out in *McMullen* v. *Travelers Insurance Co.,* 278 F.2d 834, 835 (9th Cir.), *cert. denied,* 364 U.S. 867 (1960), the right to a jury trial depends upon having an issue to go to the jury. A party who engages in knowing abuse of the discovery process forfeits the right to take any issue before the jury. This is the implicit holding of all of the cases cited at pages 12-15 above, which approve the dismissal of complaints for abuse of the discovery process.

* Section 15 of the Judiciary Act of 1789 is particularly probative of the original understanding of the Seventh Amendment because it was enacted by the same First Congress which formulated the Bill of Rights. *See, e.g.,* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 54-56 (1923).

If the rule were otherwise, a party could with impunity engage in attempts to withhold essential evidence and to deceive the Court and the other parties, secure in the knowledge that, even if his misconduct were detected, he would have an indefeasible right to insist upon a plenary jury trial on the merits. Such a rule would fatally undermine the deterrent effect of discovery sanctions, the importance of which was stressed by this Court in *National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 642-43 (1976).

For all of these reasons, petitioners' contention that the holding of an evidentiary hearing on respondents' motion for sanctions would deny petitioners their right to a jury trial under the Seventh Amendment is wholly without merit.*

* In an attempt to bolster their jury trial contention, petitioners assert that all of the grounds upon which respondents' motion for sanctions is based involve the same factual issues as petitioners' denials of rebating in their replies to Sea-Land's counterclaims (Pet. 13-15). This assertion is not only irrelevant (since willful misrepresentations affecting issues raised by the pleadings furnish at least as firm a basis for sanctions as misrepresentations affecting other issues), but also contrary to fact. The denials of rebating in petitioners' replies encompass petitioners and their agents, and speak as of December 23, 1976, February 3, 1977, and July 12, 1977 (*see* pp. 5-6 *supra*). Petitioners' other denials of rebating encompass payments made by any person (*see* pp. 6-7 *supra*), and speak as of October 15, 1976, November 29, 1976, February 28, 1977, March 21, 1977, and July 1, 1977 (*see* pp. 5-7 *supra*).

Moreover, respondents' motion for sanctions is based not only upon petitioners' misrepresentations of rebating, but also upon their failure to obey the discovery orders of the District Court, which plainly involves issues entirely distinct from those raised by the pleadings.

Finally, petitioners suggest that the District Court has ruled that its findings of fact on the motion for sanctions would be binding upon the parties in any later stages of these actions, including trial (Pet. 21 n.*). In fact, the District Court has made no such ruling.

4. The Court of Appeals Properly Exercised Its Discretion in Declining to Issue a Writ of Mandamus

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *E.g., Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976); *Will* v. *United States,* 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 382-85 (1953). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976), *quoting Will* v. *United States,* 389 U.S. 90, 95 (1967). The party seeking issuance of a writ of mandamus must show that his right to the issuance of the writ is "clear and indisputable." *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976), *quoting Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 384 (1953).

In light of these well established criteria for the issuance of a writ of mandamus, the refusal of the Court of Appeals to grant petitioners' petition for mandamus was plainly correct. Far from presenting a "clear and indisputable" case for a writ of mandamus, petitioners' argument is without any support in history, principle, or authority. Far from establishing a judicial "usurpation of power", the record in this case reveals a fully justified determination by the District Court to conduct an evidentiary hearing to resolve grave and substantial questions raised by petitioners' repeated abuse of the discovery process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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